

FIRST APPEAL No. 190 OF 1996

Against the Judgment/ Order dated 22.03.1996 and the final decree passed by Sri Mahendra Narain Singh, Subordinate Judge-I, Patna in Title Partition Suit No.37 of 1994.

AMARENDRA KUMAR

..... Plaintiff/Appellant

Versus

SMT.ANJALI DEVI

..... Defendant /Respondent

For the Appellant : Mr. A. B. Ojha, Advocate,
Mr. Nirmal Chandra, Advocate,

For the Respondent : Mr. R. K. P. Singh, Advocate,
Mr. Balbhushan Chaudhary, Advocate,
Mr. Amrendranath Vishames, Advocate.

Dated : 5th day of January, 2011.

P R E S E N T

THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

J U D G M E N T

**Mungeshwar
Sahoo, J.**

1. This First Appeal is directed against the Judgment/ Order dated 22.03.1996 recording compromise and the final decree signed on 06.04.1996 by Sri Mahendra Narayan Singh, the learned Subordinate Judge-I, Patna in Title Partition Suit No.37 of 1994.

2. It appears that originally the defendant No.1, Devnandan Singh, had filed this Appeal. On his death, the present appellant, Amrendra Kumar, who was respondent No.1 in this First Appeal, was transposed as sole appellant. This Amrendra Kumar is son of original appellant Devnandan Singh. The present appellant Sri Amrendra Kumar filed aforesaid partition suit claiming

1/5th share in Schedule I and II properties mentioned in the plaint. In the said suit, the defendant No.1 was father of the plaintiff, i.e., Sri Devnandan Sinha. The said Devnandan Sinha defendant No.1 had two wives, namely, Smt. Anjali Devi and Smt. Chandrakanta Sinha who were defendant-respondent No.2 and 3. The 3 sons from the second wife Chndra Kanta Sinha are the plaintiff-appellant Amrendra Kumar and defendant-respondent No.4 and 5, namely, Dr. Nirmal Kumar and Devendra Kumar respectively.

3. It appears that on 27.09.1995 an alleged compromise application was filed which was signed by both the parties. This compromise application is a part of the decree under challenge. In paragraph 4 and 5 of the said alleged compromise application, it is stated as follows :

"4. That the plaintiff, defendant No.1, 2, 3, 4 and 5 have jointly agreed that till the date of the final petition, after fulfilling the above obligations is not filed before this Hon'ble Court, the parties shall be entitled to receive all the benefits, which they are receiving from their respective holdings under their possession from before this compromise petition.

5. That this compromise petition is filed before this Hon'ble Court to keep it on record and no order shall be passed until and unless all the aforesaid conditions are fulfilled."

4. In the prayer portion of the said compromise application, it is prayed as follows :

"It is, therefore, prayed that your honour may graciously be pleased to keep this compromise petition on record till another petition is filed before this Hon'ble Court for the disposal of this partition suit."

5. This compromise application has been recorded by the learned Court below by terms of order dated 22.03.1996 and final decree was passed.

6. The learned counsel for the appellant submitted that in the alleged compromise petition, the intention of the parties was to file a fresh compromise application and till the second compromise application is filed, prayer was made

to keep it on record and it was specifically prayed that the Court should not pass order on this compromise application. From the very beginning, whenever the compromise application was posted, the defendant No.1 and the appellants were always objecting to recording of this compromise application on the ground that the terms and conditions mentioned in the compromise application have not been fulfilled but the learned Court below prior to recording the compromise directed the Nazir to give delivery of possession to the parties and in spite of the fact that the Nazir/Shrestdar gave report to the effect that unless police force is provided, he is not in a position to give delivery of possession then also the learned Court below rejected the objection of the appellant and recorded the compromise. The learned counsel further submitted that although it was clearly stated that second application is to be filed, second application was never filed by the parties. Fraudulently, the respondent No.4 and 5 filed an application before the Court below stating that the terms and conditions have been fulfilled and on that date although objection was raised but then it was decided by the Court below and overruled the objection. The learned counsel further submitted that the learned Court below has adopted a procedure unknown to the law and he himself become party to the compromise and moreover when there was objection, the Court could not have compelled the appellant to compromise and imposed the compromise upon the unwilling parties. The learned counsel further submitted that the impugned Judgment and decree are, therefore, unsustainable in the eye of law.

7. The learned counsel, Mr. R.K.P. Singh appearing on behalf of the respondent at the very outset submitted that the Appeal itself is not maintainable as the Appeal is directed against a compromise decree, therefore, the Appeal is barred under Section 96 (3) C.P.C. The learned counsel further submitted that originally the defendant No.1 has filed the Appeal and the

present appellant, Amrendra Kumar who was plaintiff in the Court below did not challenged the compromise decree and, therefore, at his instance, the Appeal is not maintainable. The learned counsel further submitted that in fact the application was a compromise application because it was signed by the parties and their Advocates. In the said compromise application, the terms and conditions were mentioned but the defendant and plaintiff were objecting to it on untenable ground and, therefore, the Court had the jurisdiction to see that the terms and conditions mentioned in the compromise application are fulfilled or not and in furtherance thereof, the learned Court below passed the orders directing the Nazir to issue delivery of possession. According to the learned counsel, this was within the jurisdiction of the Court and after hearing the parties and considering the objections raised by the defendant No.1 and plaintiff, the learned Court below overruled the objection and recorded the compromise. Therefore, there is no illegality in the impugned Judgment and Order. As such the First Appeal is liable to be dismissed.

8. In view of the above facts and circumstances of the case, the points arises for considerations are :

- (i) As to whether this First Appeal is maintainable or is barred under Section 96 (3) C.P.C. and whether this First Appeal is maintainable at the instance of Amrendra Kumar who was subsequently transposed as appellant.
- (ii) Whether the application dated 27.09.1995 is compromise application and the learned Court below could have recorded the said application and disposed of the suit on the basis of the same and prior to recording the compromise, the learned Court below could have passed orders directing Nazir to give delivery of possession to the parties.

9. So far **point No.(i)** is concerned, it may be mentioned here that this question has already been settled at rest by the Apex Court in the case of ***Banwari Lal Vs. Chando Devi, A.I.R. 1993 (S.C.) 1139***. Section 96 sub-Section 3 C.P.C. is applicable when there is no dispute regarding factum of

compromise but where there is dispute regarding factum of compromise, the Appeal against decree is maintainable and in the said Appeal, the appellant may assail the order recording compromise on the ground that the compromise should not or should have been recorded by the Court below. Earlier, the order recording or refusing to record the compromise was appealable under Order 43 Rule 1 (M) C.P.C. but the same was deleted and a new provision Order 43 Rule 1 (A) has been introduced. Moreover, at the very initial stage on being noticed, the respondent appeared and filed application raising this ground that this First Appeal is not maintainable. After hearing the parties by terms of Order No.8 dated 19.09.1996, this Court has already held that the Appeal is maintainable as right has been given under Order 43 Rule 1 (A) (2) C.P.C. to a party who challenges the recording of the compromise, to question the validity thereof while preferring an Appeal against the decree. Now, therefore, at the final hearing, the same question is being raised by the respondent. The learned counsel, Mr. Singh, submitted that the earlier order No.8 is interlocutory order and interlocutory order cannot be a final order and therefore, at the time of hearing, the same can be altered. So far this submission is concerned, I do not agree with the learned counsel for the respondent. This is purely a question of law and after hearing the parties, the order was passed by this Court holding that the Appeal is maintainable. Therefore, the principle of resjudicata will apply. It is well settled principle of law that in the same proceeding in subsequent stages, resjudicata is applicable. In the present case, this question has already been decided as stated earlier which will, therefore, operate as resjudicata at this subsequent stage also. I, therefore, find that this First Appeal is maintainable because the appellant is challenging the recording of compromise itself. Here, the factum of compromise is in dispute and, therefore, Section 96 (3) C.P.C. will not operate as a bar to the Appeal.

10. The learned counsel for the respondent submitted that the Appeal is not maintainable at the instance of Amrendra Kumar because he had not filed the Appeal originally. On the death of his father, he has been transposed as the appellant. So far this submission is concerned also, I do not agree with the learned counsel for the respondent. It is well settled principal of law that in a partition suit, everyone in the suit whether he is a plaintiff or a defendant is the position of plaintiff. Anyone of them can maintain the suit. If plaintiff withdraws himself or left pairvy, the defendant may be transposed as plaintiff and the plaintiff may be transposed as defendant at any stage and in a partition suit, it is frequently done. According to Order 41 Rule 4 C.P.C., anyone of the plaintiff or defendant in filing an Appeal represents all the other non-appealing plaintiffs or defendants, who wants the reversal or modification of the decree in favour of them as well. In the present case as stated above since it arises out of partition suit and the stand of plaintiff and defendant No.1 was the same, the plaintiff has been transposed as appellant. In such view of the matter, it cannot be said that Appeal is not maintainable at his instance.

11. So far the **point No.(ii)** is concerned, some facts may be stated that on 27.09.1997, the compromise application was filed. At paragraph 4 and 5 and the prayer portion, it was stated that till further application is filed by the parties, the said application shall be kept on record and no order should be passed. The terms and conditions mentioned in the said application was to be completed by 30.11.1995. Therefore, the learned Court below posted the same application fixing 30.11.95 in the case. On 30.11.1995, the plaintiff, i.e., present appellant filed an application stating that the conditions of the compromise application have not been fulfilled. Thereafter, it was posted on 05.12.1995. On that day, the Court directed the Shrestdar to give a report fixing 06.12.1995. On 06.12.1995 again the plaintiff filed an application stating

that since the conditions of the compromise has not been fulfilled, therefore, no order should be passed on compromise. The case was posted for 07.12.1995. On 07.12.1995, defendant No.1 also filed an application stating that the suit should be postponed till the conditions of the compromise application are fulfilled. The plaintiff also stated the same thing before the Court below and requested not to accept the compromise. From perusal of the order dated 07.12.1995, it appears that after some time, the defendant filed an application that all the conditions have been fulfilled and, therefore, the Court below directed the Shrestdar to give a report regarding three point :

- 12.** (i) Whether the compromise is defectless ?
 (ii) Whether the parties to the compromise has fulfilled the conditions and
 (iii) Whether the compromise is acceptable ?

13. The Court below fixed the case for 15.12.1995. It appears that letter on the same day, the defendant No.4 & 5 filed an application and also filed some papers and deposited the key with the Shrestdar and prayed to keep the same. The Court directed to keep the same in safe custody. On 15.12.1995, the plaintiff and defendant No.1 & 2 submitted that the compromise is still incomplete and, therefore, requested not to accept the compromise. However, the defendant No.3 to 5 submitted that all the terms and conditions of the compromise have been observed and, therefore, prayed that the compromise be accepted. The learned Court below after hearing the parties directed the plaintiff and defendant No.1 & 2 to receive the documents and keys and the Nazir, Civil Court, Patna was directed to affect the delivery of possession at the spot at the cost of the defendant No.3 to 5 and directed to give a report. The learned Court below also observed that after the report of the Nazir regarding delivery of possession in terms of the compromise, orders shall be passed on merits on compromise petition and directed the defendant No.3 to 5 to deposit

Rs.500/- as cost of Nazir for affecting the delivery of possession. From perusal of order dated 23.01.1996, it appears that Nazir gave a report to the effect that the parties are not co-operating with him. On 30.01.1990, the Court again directed the Nazir to give possession to the parties according to compromise. On 30.01.1996, the defendant No.1 & 2 filed an application praying therein to declare the compromise application as null and void. The defendant No.4 & 5 filed counter affidavit to the said application on 01.03.1996. On 11.03.1996, the learned Court below in absence of plaintiff and defendant heard the defendant No.4 & 5 and posted for 22.03.1996 for orders and the impugned order was passed making the report of the Nazir as the basis.

14. From the above facts, it appears that as agreed by the parties that a second application shall be filed subsequently was never filed by the parties. Prior to recording of the compromise the dispute arose between the parties and the plaintiff and defendant No.1 & 2 always filed application before the Court below stating that the terms and conditions have not been fulfilled and, therefore, the compromise application should not be recorded. In such view of the matter, the learned Court below should have enquired into the matter according to the provision as contemplated under Proviso to Order 23 Rule 3. No such enquiry was held, no evidence were adduced by the parties. The learned Court below acted on the basis of the report of Shrestdar. In the present case, it appears that prior to recording compromise, the Court below directed the Nazir to give delivery of possession. In other words, prior to decree, the proposed decree was executed by the Court below. Moreover, the report, if any, of the Shrestdar was not admissible in evidence without his examination as witness, there is no such provision in the C.P.C. to make such direction to the Nazir to give delivery of possession prior to decree is passed.

15. The learned counsel for the respondent relied upon **A.I.R. 1951 Patna 299 Ram Janam Tiwary Vs. Bindeshwary Bai** and submitted that the Court has jurisdiction to make consequential order to give effect to the terms of the compromise. From perusal of the said decision, it appears that the parties were disputing the factum of compromise. The Court never appointed any Officer of the Court to give delivery of possession as has been done in the present case. It appears that in that case, the Court accepted the consideration amount which was deposited before the Court when the defendant was not found. In my opinion, therefore, that decision is not applicable in the present facts and circumstances of the case. The learned counsel for the respondent further relied upon various decisions such as **A.I.R. 1980 Orissa 108 Bhaja Gobinda Mica Vs. Janki Dei, 2000 (1) P.L.J.R. 897 Dwarika Giri Vs. Bharm Dev Giri, 1993 (2) P.L.J.R. 725 Noor Mohammad Khan Vs. Mrs. Marry Khan.** From perusal of these decisions, it appears that none of the said decisions are applicable in the present facts and circumstances of the case. The contentions of the learned counsel for the respondent that the Court has the jurisdiction to direct the Nazir or the Officer to the Court for effecting delivery of possession according to the terms and conditions of the compromise prior to recording the compromise application is not supported by any of the above decision. The learned counsel for the respondent is also unable to show me such provision in C.P.C. empowering the Court to pass such orders. According to the Proviso to Order 23 Rule 3, the Court can enquire when it is denied by any party that an adjustment or satisfaction has been arrived at but that enquiry should be made according to law. While enquiring under this Proviso, the Court cannot delegate his power to Nazir or any Officer of the Court. Whenever any evidence is necessary, the Court can record evidence but certainly the report of the Nazir cannot be made basis. It appears that Nazir

also gave the report mentioning that he is unable to give delivery of possession because there is no order to affect the delivery of possession with the help of police vide his report dated 15.02.1996. There is no mention as to what documents were filed before the Court and with respect to which lock the keys were deposited by the defendant No.4 & 5 which the Court directed to keep in safe custody of Nazir. Therefore, in this present case, the learned Court below adopted a procedure which is unknown to the law.

16. From bare reading of Order 23 Rule 3 C.P.C., it appears that intention of this provision is to achieve the object of recording of lawful compromise or settlement and passing a decree with the free consent of the parties and to achieve ends of justice. Finality of decision is an underlying principal of all adjudicating forums. The recording of compromise is to avoid multiplicity of litigation and permit the parties to amicably come to a settlement which is lawful and voluntary act of the parties. The Court should be instrumental in recording agreed compromise but the Court should never be a party to impose a compromise upon an unwilling party. In the present case as quoted, there was clear stipulation that the parties will file a second application. No such application was filed subsequently. Only defendant No.4 & 5 filed an application stating that the terms and conditions have been fulfilled. The plaintiff and defendant No.1 & 2 always appeared before the Court and objected to the recording of the compromise on the ground that the terms and conditions were not fulfilled. The application dated 27.09.1995 was filed with a prayer to be kept on record only. No prayer was made in that application to record the same. In that application only, certain terms and conditions were shown to which the parties agreed. Therefore, in my pinion, it was not at all a final compromise application. The learned counsel for the respondent submitted that the said application fulfilled all the conditions mentioned in Order 23 and,

therefore, it can be termed only as compromise application. So far this submissions is concerned also, it is devoid of any merit because in the said application, it was never prayed by the parties to record it as compromise. It is clearly mentioned therein that after full and final settlement, another application shall be filed by the parties which was never filed.

17. It appears that during the course of hearing of I.A. No.9683 of 2010 has been filed on behalf of the appellant under Order 41 Rule 27 read with Section 151 C.P.C. praying therein to allow him to adduce further evidence. The learned counsel for the appellant submitted that earlier partition suit No.277 of 1976 had been filed by Nirmal Kumar with regard to the present property. That suit was also compromised. Chandrakanta Devi has sold some property in 1984. So far this contention of the learned counsel for the appellant is concerned, it may be mentioned here that the present appellant was the plaintiff in the Court below. These facts were not pleaded in the original plaint. If this application is allowed at this stage then it will amount to introduce a new fact which the plaintiff never pleaded in the plaint. The fact stated in this interlocutory application cannot be said to be the case of the plaintiff. Without there being any pleading, i.e., without making amendment in the plaint, such plea cannot be allowed to be raised in interlocutory application. I, therefore, find no merit in this application and accordingly the same is rejected.

18. It further appears that the defendant-respondents also filed an application being I.A. No.8619 of 2010 under Section 151 read with Order 41 Rule 27 C.P.C. praying therein to permit them to adduce additional evidence. The learned counsel for the respondent in support of the said application submitted that during the pendency of the appeal, Amrendra Kumar the present appellant filed a mutation application in Patna, Municipal Corporation on the basis of compromise decree dated 23.03.1996. The respondents may be

permitted to adduce evidence by producing the certified copy of petition and the objection petition dated 16.12.1996. The learned counsel submitted that since the appellant filed the mutation case on the basis of compromise decree, the compromise decree was acted upon and, therefore, he is estopped to challenge the compromise decree. A counter affidavit has been filed by the appellant. It is stated in the counter affidavit that the said applications is forged document. I have heard the parties on this interlocutory application also. The respondents have field this application to bring on record the subsequent event after final decree. Even if the said application is brought on record then also it has got no bearing on the merit of the Appeal. Moreover, in the present case, the appellant has stated that the said petition was never filed by him and it is forged document. Now, therefore, this issue between the parties regarding the said petition of mutation will be a new question of fact which is totally foreign to the issue required to be decided in the present appeal. This Court is deciding the legality or otherwise of the order recording compromise. Therefore, if the order recording compromise is illegal which should not have been recorded then it will not be legalized by the mutation petition filed by the appellant subsequent to the decree. In my opinion, therefore, this application has also got no merit and accordingly this interlocutory application is also rejected.

19. In view of the above discussion, I find that in the present facts and circumstances of the case, the learned Court below could not have recorded the compromise. The Court below could not have issued writ for delivery of possession to the Nazir prior to the decree. It appears that the learned Court below acted as an executing Court which he could not have done. Thus the Point No. (ii) is also decided in favour of the appellant.

20. The interlocutory application being I.A. No.3365 of 2007 has been filed by the appellant for adding his minor daughter, Ms. Sukeshi Sinha. This

application was directed to be heard at the time of hearing. Heard the parties on this application also. The learned counsel for the appellant submitted that because of amendment in the Hindu Succession Act by amendment Act 2005, she is a necessary party and, therefore, she may be added as appellant No.2 in the Appeal. Without going to the merit of the claims whether she has any title or not, she is added as appellant No.2 in this Appeal. The Interlocutory Application stands allowed.

21. In view of my above findings, the impugned Judgment / Order and the Decree are not sustainable in the eye of law. In the result, this First Appeal is allowed and the impugned Judgment / Order and Decree are set aside and the suit is remanded back to the Court below for proceeding ahead according to law. In the facts and circumstances of the case, the parties shall bear their own costs.

(Mungeshwar Sahoo, J.)

Patna High Court, Patna
The 5th January, 2011
 Sanjeev/N.A.F.R.

